88-108

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIE BIGFORD, JR.
PETITIONER

V.

JOE MAX TAYLOR, ET AL,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEATRICE MLADENKA-FOWLER
NELSON, LOCKE & FOWLER
3303 Main St., Ste. 300
Houston, TX 77002-9392
(713) 526-1998

J. PATRICK WISEMAN
RICHARDS, WISEMAN & DURST
600 W. 7th Street
Austin, Texas 78701
(512) 479-5017

Attorneys for Willie Bigford Jr.

I.

QUESTIONS PRESENTED FOR REVIEW

(1) Has *Monell* policy been established under *Pembaur v. City of Cincinnati* when statute is properly challenged at trial court and state actors are parties to litigation?

(2) Is County liable for damages resulting from the unreasonable seizure of Petitioner's truck where the officer was acting pursuant to County policy to seize vehicle on the basis of missing federal safety inspection sticker, regardless of lack of probable cause to believe the vehicle was stolen?

II.

PARTIES TO THE PROCEEDINGS

Plaintiff/Appellant in the Court below:

Willie Bigford, Jr.

Defendants/Appellees in the Court below:

Joe Max Taylor, Individually and as Sheriff of Galveston County, Texas

Kenneth Spoor, Individually and as Deputy of the Galveston County's Sheriff's Department

Art Chapa, Individually and as Deputy of the Galveston County's Sheriff's Department

Tommy Hansen, Individually and as Deputy of the Galveston County's Sheriff's Department

Galveston County, a political subdivision of the State of Texas

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WILLIE BIGFORD, JR.
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RESPONDENTS

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

Petitioner, Willie Bigford, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 5, 1988, with Petitioner's timely Motion for Rehearing denied on March 10, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for which review is sought is reported in *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988) and is attached as Appendix "A". A copy of the Judgment is attached as Appendix "E" and the Denial for Rehearing is included as Appendix "F".

Also attached are copies of the Final Judgment and Findings of Fact and Conclusions of Law of the District Court filed on March 5, 1987 (Appendix "B"), the unpublished opinion of the Fifth Circuit in *Bigford v. Taylor*, 784 F.2d 1111, February 24, 1986, reversing and remanding to the District Court (Appendix "C"), and the Motion Conference Order denying Certification to the Attorney General signed on May 21 1984 (Appendix "D").

JURISDICTION

The opinion of the Court of Appeals was entered on January 5, 1988. Petitioner's and Respondents' Petitions for Rehearing, which were timely filed, were denied on March 10, 1988. Petitioner's application for an extension of time within which to file a petition was granted on June 7, 1988, extending Petitioner's time to and including June 22, 1988, as allowed by 28 U.S.C. §2101(c) This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person...[shall] be deprived of life, liberty, or property, without due process of law;...

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 U.S.C. Section 1983 of the Civil Rights Act provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

> subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C § 2403(b) states in pertinent part:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence...and for argument on the question of constitutionality.

The Tex. Code Crim. Proc. Ann., Chapter 47 "Disposition of Stolen Property" (Vernon's 1979) states in pertinent part:

> An officer who comes into custody of property alleged to have been stolen must hold it subject to the order of the proper court or magistrate. art. 47.01
>
> ***
>
> If no criminal action is pending, a magistrate of the county or city in which the property is being held may hold a hearing to determine the right to possession of the property, upon the petition of any interested person. The magistrate shall order the property delivered to whoever has the superior right to possession, subject to the condition that the property be made available to the prosecuting authority should it be needed in the future, or the magistrate may remand the property to the custody of the peace officer. art. 47.01a

STATEMENT OF THE CASE

While driving to work in his truck before dawn on July 13, 1982, Willie Bigford, an 18 year old just out of high school and doing carpentry work, ran out of gas on a country highway near Galveston, Texas. He walked to the nearest gas station, found it still

closed, and returned to the truck and laid down on the seat to wait until the station opened.

Willie Bigford had just bought his truck with $1500 he saved working part-time during school and on holidays. The truck was beat up, rusty and badly in need of paint. Bigford's dream was to paint it and fix it up when he had the time and money.

Kenneth Spoor, a Galveston County Sheriff's Deputy on patrol, saw Bigford's truck parked beside the road. He approached it to investigate and, seeing Bigford lying down in the cab, knocked on the window and motioned for him to step outside. When Bigford opened the door, Deputy Spoor glanced at the vehicle body facing the end of the door and noticed that the Federal Inspection Safety Sticker (FISS or Nader sticker) was missing.

Although admitting that he was unaware of what law applied, Spoor was trained to notify his supervisor when he found a vehicle whose federal safety sticker was missing. He called a Sgt. Cook, who arrived and further inspected the truck, both inside the cab and under the hood. Sgt. Cook thought it appeared someone had tampered with the rivets on the plate containing the truck's vehicle identification number (VIN), which was also located on the door panel. He also thought the truck's body did not appear to match its frame, and when he looked under the hood to find the VIN, which is often stamped there, he could find no number.

Using his radio to order a computer check from a nationwide data base, Deputy Spoor learned that no theft complaint had been lodged for a vehicle with the truck's VIN or license tags. Neither Sgt. Cook nor Deputy Spoor asked

Bigford if the truck was stolen or if he had proof of ownership, although Bigford had produced a valid driver's license upon Deputy Spoor's request. Had the officers asked, Bigford could have produced from the truck's glove compartment a notarized title certificate, showing the transfer of the truck to him from its previous owner, his employer.

At no time did the officers ever suspect or charge Bigford with stealing or tampering with the truck, and he was never arrested for or charged with possession of a stolen vehicle. They did not telephone Bigford's employer or attempt to verify the ownership of the truck in any way. Instead, they seized the vehicle for further investigation. During their possession of the truck over the next six month period, the officers cut a hole in the floorboard in an attempt to find the VIN which they

were previously unable to locate under the hood. Eventually that number was discovered on the engine frame, apparently overlooked when they initially inspected the truck.

After many attempts to regain possession of his truck, hiring several lawyers, and visiting with the Judge handling the case, Bigford finally learned on December 2, 1982 that the truck was not stolen, and he could have it back if he paid the towing and storage fees which had accumulated to $700 or $800 over the past six months.

During that time, Bigford never received notice or citation, and was not offered an opportunity for a hearing or posting of a bond to regain possession of his truck. Mr. Bigford, unable to pay the high storage fees, sued the County and individual defendants for wrongful seizure and denial of due process.

The County first defended by stating that the truck was seized pursuant to the Certificate of Title Act, Tex. Rev. Civ. Stat. Ann. art. 6687-1(d) (Vernon's 1977). The trial Court granted summary judgment and Bigford appealed. The Fifth Circuit, in *Bigford v. Taylor*, 784 F.2d 1111 (February 1986 - unpublished opinion)(Appendix "C"), held that the statute relied upon by the County was "patently" inapplicable and reversed and remanded for consideration of Bigford's due process challenge.

On remand, the County argued that Bigford was under arrest and that his truck was seized pursuant to art. 47.01 of the Texas Code of Criminal Procedure, Vernon's Rev. Civ. Stat. Ann. The trial court again ruled in favor of defendants, finding that no arrest occurred but also finding sufficient probable cause to seize the truck based

truck based on the missing sticker and the indications that the VIN might have been altered. Based upon his finding of probable cause, the court ruled that Bigford had received all the process he was due (Appendix "B").

On appeal the Fifth Circuit held that Bigford's truck had been wrongfully seized without probable cause by Spoor. It held, however, that the sheriff and county were not liable because Bigford failed to prove the existence of a policy or custom that was the "moving force" behind the illegal seizure. The Circuit Court also held that Bigford's due process claims could not be reached because the county could not be held liable 1) for the Judge's failure to provide Bigford with a hearing or 2) for the effectuation of the policy of the State of Texas embodied in the statute which did not authorize a procedure by

which Bigford could post a bond and regain possession of his truck (Appendix "A").

The jurisdiction of the District Court was properly invoked pursuant to 28 U.S.C. §§1331 and 1343 to determine Petitioner's claims under 42 U.S.C. §§1983, 1988 and pendent claims.

ARGUMENT FOR GRANTING THE WRIT

The Fifth Circuit's reliance on *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) that Petitioner cannot hold anyone liable for actions taken pursuant to an unconstitutional state statute is in conflict with this Court's holdings in *Pembaur v. City of Cincinnati*, 475 U.S. ___, 106 S.Ct. 1292 (1986). Petitioner properly challenged the constitutionality of the statute under which his property was seized and the trial court denied his request for certification to the Attorney General of the State of Texas, finding that the

State was a party to the suit via the Sheriff and Galveston County.

The Fifth Circuit has reached conflicting results in application of the federal question of county "policy" under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) and subsequent cases in holding that the county was not liable for the wrongful seizure of Petitioner's truck.

A. UNCONSTITUTIONAL STATUTE

Failure of the Fifth Circuit Court of Appeals to rule on the constitutionality of the statute under which Respondents seized and retained Petitioner's truck results in the nullification of 28 U.S.C. §2403 which states that the court "shall" certify a challenge to the constitutionality of a statute to the state attorney general.

As a matter of public policy, the state must build into its system enough

procedures to protect its citizens from abuse by the state.

In April, 1984 Petitioner requested the trial court to certify to the Attorney General the constitutionality of the statute then relied upon by the Respondents.[1]

The trial court denied Bigford's request for certification on May 21, 1984 (Appendix "D"), finding that the state was already a party to the litigation because the county officials

---

1. As noted in the statement of facts, defendants originally alleged that the seizure was made pursuant to Tex. Rev. Civ. Stat. Ann. art. 6687-1, §49(d) (Vernon's 1977), the Certificate of Title Act. After the Court of Appeals held that statute to be inapplicable in February, 1986, defendants argued that they had authority to seize the truck pursuant to Tex. Code Crim. Proc. Ann. art. 47.01 or 18.16 (Vernon's 1979). At trial however, Respondents conceded that 47.01 is only a "disposition" statute and presented testimony that the seizure was lawful pursuant to art. 6687-1, §49 (b) or (c). Petitioner pursued his complaint of unconstitutionality of the statutes again on the second appeal to the Circuit Court.

were parties under Texas law, and counties are political subdivisions operating as agencies of the State, citing to *Rodriquez v. Medical Arts Hospital*, 437 F.2d 1203 (5th Cir. 1971).

It is undisputed that the State has an interest in attempting to stop the purchase and sale of stolen vehicles. Thus, the State of Texas enacted the "Disposition of Stolen Property" bill, Tex. Code Crim. Proc. Ann. art. 47.01 (Vernon's 1979). However, any interest the state may have in seizing an "allegedly stolen vehicle" must be balanced against the interest of the property owner in the use and possession of his property.

This Court has consistently held that where a property interest exists in an individual, there must be some built-in safeguards to prevent the taking of that property by the government without due process of the law. *Matthews v.*

Eldridge, 424 U.S. 319, 332 (1976); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

> To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

Logan v. Zimmerman Brush Company, 455 U.S. 420, 434, 102 S.Ct. 1148, 1156-7 (1982).

In Mr. Bigford's case, the state took his property, literally destroyed it by cutting a hole in the floorboard and leaving it in an open storage lot where it sat unprotected through hurricane Alicia, and failed completely to give him an opportunity to present his claim of entitlement. As pointed out repeatedly in the record, the briefs and both Fifth Circuit opinions, even the state actors themselves did not know under which Texas scheme they were authorized to seize Bigford's truck. Each time Petitioner guessed under which

shell his "due process" rights were hiding, the shells were switched.

When the system breaks down, as it obviously did here, the state cannot sit back and let its own inaction deprive the citizen of his property. Due process requires that the state, not the citizen, take some affirmative action to ensure that the citizen's property is not improperly seized or retained by the police. Yet, just as in *Logan, supra*, where Plaintiff had no recourse once the state failed to give him a hearing within 120 days, here Petitioner had no way to retrieve his truck once it was seized by the police. There was no provision by which Petitioner could post a bond so he could continue to have the use of his truck for work pending the investigation by the Sheriff's department, *Breath v. Cronvich*, 729 F.2d 1006, (5th Cir. 1984); *Stypman v. City of San Francisco*, 557 F.2d 1338 (9th

Cir. 1977). Moreover, the statute relied on by Galveston County as authorization for the seizure required no action to be taken by the County to ensure that Petitioner was not wrongfully deprived of his property.[2]

If there had been any way for Petitioner to have possession of his truck pending the outcome of the county's investigation, there would have been no need for this lawsuit.

Finally, the Circuit Court's reliance on *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) in holding that "none of those who are made defendants to this claim may be liable" for the statute's failure to offer

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2. The Fifth Circuit, J. Rubin, stated: "Although the magistrate may have breached his state-law duty in failing to set a hearing, he did not violate state law in failing to offer Bigford the bond procedure, for arts. 47.01-11 themselves authorize no such procedure." *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988) (Appendix "A").

Petitioner a bond procedure is contrary to this Court's holding in *Pembaur v. City of Cincinnati*, 475 U.S.___, 106 S.Ct. 1292 (1986).

Petitioner properly challenged the constitutionality of the statute at the trial court and upon appeal. The State is a party, and Petitioner has established a *Monell* policy via the state statute.

> No one has ever doubted, for instance, that a municipality may be liable under §1983 for a single decision by its properly constituted legislative body - whether or not that body had taken similar action in the past or intended to do so in the future - because even a single decision by such a body unquestionably constitutes an act of official government.

Pembaur, 475 U.S. at ___, 106 S.Ct. at 1298.

In addition, JUSTICE WHITE, concurring, stated:

> In this case, however, the sheriff and the prosecutor chose a course that was not forbidden by any applicable

> law, a choice that they then had the authority to make.' This was county policy, and it was no less so at the time because a later decision of this Court declared.. [the challenged action]..to be in violation of the Fourth Amendment.

Id. at 1302 (citation omitted).

See, also, O'CONNOR, J., concurring in part and concurring in the judgment:

> Given that this procedure was consistent with federal, state and local law at the time the case arose, it seems fair to infer that respondent county's policy was no different.

Id. at 1304.

The conflict resulting from the Circuit's failure to rule on the constitutionality of the statute, art. 47.01, should be resolved so as to give relief to Petitioner and effect to 28 U.S.C. §2403(b).

B. WRONGFUL SEIZURE

The Fifth Circuit's opinion that Galveston County and the Sheriff's Department could not be liable for

Petitioner's damages incurred by the seizure of his truck in violation of the Fourth Amendment is in conflict with *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) and *Pembaur v. City of Cincinnati*, 475 U.S. ___, 106 S.Ct. 1292 (1986).

Deputy Spoor, a Galveston County deputy sheriff at the time this cause of action arose, seized Willie Bigford's truck because the Nader sticker was missing from the truck's door plate. The Fifth Circuit correctly concluded:

> Considering the facts known to the police and available to them on reasonable inquiry at the place where the truck was seized, however, officers acting reasonably and prudently on the basis of all the available information, and familiar with the practical considerations of everyday life, would not have concluded that the truck had been stolen.

Bigford, 834 F.2d at 1219 (Appendix "A").

Deputy Spoor testified that he followed Galveston County Sheriff's Department procedures when he called the supervisor to the scene and subsequently towed the truck to headquarters for investigation. (Deposition testimony of Spoor pp.14, lines 4-20; 15, lines 24-25; 16, lines 1-2; 30, lines 10-15; and 32, lines 14-16.)

Spoor testified that he did not even know under what law or authority he had seized the truck. (*Id.*, p. 30, lines 10-12). Indeed, in his Petition for Writ of Certiorari filed separately herein, Docket No. 87-1960, Spoor argues that he was only "following his orders" in having the truck towed to the Galveston County Annex. See Petition at p. 3.

Captain Ray Lease, the Galveston officer on duty at the time of the seizure of the truck, testified in deposition at p. 29, lines 11-15:

> There really wasn't much too (sic) it. It was handled basically with the procedures that we have drawn up for handling this type of a case. And there really wasn't a lot to the old pickup.

Finally, Sgt. Tommy Hansen (Respondent), the expert who handled thefts for the county, testified that "...we did according to the law what we were supposed to do." (deposition testimony of Hansen, p. 24, lines 14-15.)

The Fifth Circuit's holding in this case that Bigford has failed to establish the existence of a county policy is contrary to *Monell* and this Court's recent decision in *Pembaur v. City of Cincinnati*, 475 U.S. ___, 106 S.Ct. 1292.

> To be sure, "official policy" often refers to formal rules or understandings - often but not always committed to writing - that are intended to, and do, establish fixed plans of action to be followed under similar circumstances

> consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary.

Pembaur, 475 U.S.___, 106 S.Ct. at 1299.

Here, Galveston County had a fixed plan of action to be followed for impounding vehicles on the basis of missing FISS stickers, regardless of other factors which militate against a finding that probable cause exists. Further proof of the impropriety of the policy was shown in the statements by Hansen:

> "...it was obvious (sic) a commercial truck, used and probably just beaten around, beaten to death, and that's probably how it occurred. We just left it at that because we had no problem with the Bigford's (sic), that they were innocent purchasers. *Sad to say, but it happens all the time.*"

Hansen deposition, p. 33, lines 14-20 (emphasis added).

Furthermore, on pp.34, line 25 to 35, lines 1-14, Hansen disclaims any responsibility on the part of the County or Sheriff's Department to pay towing and storage fees, even if the seizure was wrong, because, as he put it, "There was a violation, so it was seized." *Id.* lines 12-13. As Hansen himself noted, however, the missing Nader sticker is not a reason, in and of itself, to hold a vehicle.

> "Q. So, the fact it doesn't have the VIN number on it -- I mean, the federal inspection sticker on it is something that needs to get cured, but is not a reason to hold it?
>
> A. No, we have determined the problem that it's not -- as far as we can determine it is not a stolen vehicle. We have no reason to hold it."

Id., p. 37, lines 8-15.

In Galveston County seizures based only on a missing or altered sticker resulted in the vehicles of

innocent owners being seized as regularly as "I would say every couple of months maybe." *Id.* at p.40, l.4.

The county should be liable for Spoor's seizure of Bigford's truck pursuant to county policy and in violation of the Fourth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BEATRICE MLADENKA-FOWLER
NELSON, LOCKE & FOWLER
3303 Main St., Ste. 300
Houston, Texas 77002-9392
(713) 526-1998

J. PATRICK WISEMAN
RICHARDS, WISEMAN & DURST
600 W. 7th Street
Austin, Texas 78701
(512) 479-5017
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Beatrice Mladenka-Fowler, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Respondents by depositing same in the United States Mail, certified, return receipt requested, to the following attorney of record for Respondents: Mr. Scott Lyford, Galveston County Legal Dept., 4127 Shearn Moody Plaza, 25th & Strand St., Galveston, Texas 77550, on this the _____ day of _____, 1988.

_____

BEATRICE MLADENKA-FOWLER

APPENDIX A

WILLIE BIGFORD, JR.,
Plaintiff-Appellant,

v.

JOE MAX TAYLOR, Individually and as Sheriff of
Galveston County, Texas, et al.,
Defendants-Appellees.

No. 87-2334

United States Court of Appeals

Fifth Circuit.

Jan. 5, 1988.

Truck owner commenced §1983 action against county, county sheriff, and deputy sheriff alleging violation of Fourth Amendment rights in seizure of truck and violation of due process rights for delay in resolving seizure and returning truck. After remand, 784 F.2d 1111 (unpublished opinion), the United States District Court for the Southern District of Texas, Hugh Gibson, J., entered judgment for defendants, and truck owner appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge,

held that: (1) truck was seized without probable cause in violation of Fourth Amendment; (2) sheriff was not liable for actions of his deputy in illegally seizing truck; and (3) county was not liable for due process violations occasioned by magistrate's delay in adjudicating ownership of truck.

Affirmed in part, reversed in part, and remanded.

Beatrice Mladenka-Fowler, Nelson, Locke & Fowler, Houston, TX, for plaintiff-appellant.

Scott Lyford, Galveston County Legal Dept., Galveston, TX, for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GEE and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Galveston County sheriff's police towed and kept a young man's battered pickup truck on the suspicion that it might once have been stolen because certain identification stickers were missing or appeared to have been altered. Although the police soon decided that the truck had not been stolen, and the owner repeatedly sought return of his truck, the county justice of the peace did not order that it be returned until almost five months later. By that time, the owner had lost his job because he could not drive to work, and the storage fees amounted to almost the value of the truck. Frustrated in his every attempt to obtain relief from Galveston County, the young man sued the county, the sheriff, and the officers who had seized the truck. The district court dismissed all claims, ruling that the police had probable cause to seize

the truck, the young owner had notice of the available remedies and so was not denied due process, and the county and the sheriff could not be charged for the magistrate's failure to return the truck. We affirm the holdings that the county and the sheriff may not be held liable. Because, however, the officers lacked probable cause to seize the truck originally, we reverse on this claim against one of the officers sued in his individual capacity, and we remand for the district court to determine damages.

I.

Willie Bigford, an 18 year old, had a young American's dream: a vehicle of his own. He also had energy and thrift. He worked part time after school and during holidays and saved his money. With $1,500 thus accumulated, he bought a second-hand pickup truck from his boss. The truck was beat up, rusty, and badly in need of paint, and its trans-

mission rested precariously under the hood on two two-by-fours. Still, Bigford was able to drive the truck to work every day, and he planned to paint it and fix it up when he had the time and money.

While driving to work in his truck before dawn on July 13, 1982, Bigford ran out of gas on a country highway near Galveston, Texas. He walked to the nearest gas station, found it still closed, and returned to the truck to wait until the station opened. While waiting, he dozed off in the truck.

Kenneth Spoor, a Galveston County sheriff's deputy on patrol, saw Bigford's truck parked beside the road. He approached it to investigate and, seeing Bigford lying down in the cab, knocked on the window and motioned for him to step outside. When Bigford opened the door, Deputy Spoor glanced at the vehicle body facing the end of the

door and noticed that the Federal Inspection Safety Sticker that was supposed to be affixed there was missing. Display of this sticker, which certifies that the vehicle meets federal safety standards is required by federal law.[1]

Deputy Spoor had been trained to notify a supervisor when he found a vehicle whose federal safety sticker was missing. He called a Sergeant Cook, who arrived and inspected the truck further. Sgt. Cook found other suspicious signs in addition to the missing sticker. He thought that someone had tampered with the rivets on the plate, also located in the door panel, that contained the truck's vehicle identification number (VIN). He also thought that the body of the truck did not appear to match its frame, and when he looked under the hood

1. 15 U.S.C. § 1403 (1982).

to find the VIN, which is often stamped there, he could find no number.

Using his radio to order a computer check from a nationwide data base, Deputy Spoor learned that no theft complaint had been lodged for a vehicle with the truck's VIN or license tags. Neither Sgt. Cook nor Deputy Spoor asked Bigford if the truck was stolen or if he had proof of ownership, although Bigford had produced a valid driver's license upon Deputy Spoor's request. Had the officers asked for proof of ownership, Bigford could have produced from the truck's glove compartment a notarized title certificate, showing the transfer of the truck to him from its previous owner, his employer. He had not, however, mailed these papers to the state agency responsible for recording the transfer of title.

At no time did the officers seriously suspect Bigford of stealing or tampering with the truck, and they never arrested him or charged him with possession of a stolen vehicle. They did not telephone Bigford's employer or attempt to verify the fact that he was a local resident. Instead, and in spite of the computer report, they decided to tow the truck to a privately owned storage yard for further investigation. From previous experience, they knew or should have known that the owner of this business would charge Bigford for storage of the vehicle, whether or not the investigation ultimately determined the truck was Bigford's. When Bigford's mother arrived at the police station to pick up her son, the officers told her that they had to investigate the missing sticker and that she should call them in two days if she had not heard from them.

During the next two weeks, Bigford and his parents made a series of unsuccessful attempts to find out why the police were continuing to hold his truck. The police told the Bigfords several times that they had no new information and that the investigation would take 30 days or more. The investigation, which the district court found in fact took about two months, may be described charitably as perfunctory. The police performed a title search, which revealed a clear chain of title down to Bigford. By the time the police had completed this task, the Bigfords had searched the title themselves and obtained the same result. Without judicial authority or permission from Bigford, the police cut a hole in the floorboard of the truck in an attempt to find the VIN. Eventually, that number was discovered on the engine frame, apparently overlooked by the officers when

they seized the truck. Based on these results, the police concluded the truck was not stolen, but they said nothing to Bigford.

In the meantime, by virtue of Texas law, custody of the truck had passed almost immediately from the police to Judge James Buckner, a county justice of the peace. When Texas police seize a vehicle alleged to have been stolen, they file an inventory of its contents with a justice of the peace, who is required to hold a hearing to determine the rightful owner.[2] The district court found that Judge Buckner's office received the inventory on July 14, the day after the seizure, although it does not appear that the police ever filed a formal charge that the vehicle had been stolen. The Bigfords received no notice

2. Tex. Code Crim. Proc. Ann. art. 47.01-11 (Vernon's 1979).

or citation advising them that the matter was in the hands of the justice of the peace.

Although he had received the inventory in July, Judge Buckner took no action of any kind until almost three months later. Sometime between October 13 and 21, he finally placed the matter on his docket. During the three months that the file sat on his desk, the truck sat in storage, accruing fees at something between $3 and $5 a day.

The Bigfords did not actually learn that the courts had custody of the truck until July 28, when, on a visit to the sheriff's office, they were told so by Deputy Tommy Hansen, the officer conducting the investigation. Hansen did not, however, specify which court had jurisdiction over the truck. He did advise the Bigfords to hire a lawyer. The Bigfords hired two over the next six weeks, but neither took any action.

Finally the Bigfords decided to locate the right court on their own. After being directed to the wrong magistrate, the Bigfords were again set straight by Tommy Hansen, who directed them to Judge Buckner and also explained that it was up to them to petition the judge for return of the truck.

In mid-September, the Bigfords met with Judge Buckner and an assistant district attorney. The judge told the Bigfords he could not act until they petitioned for a hearing; like Hansen, he suggested they retain a lawyer. The Bigfords hired their third lawyer, Kent Schaffer, in October. Schaffer arranged a hearing with Judge Buckner for November 4; this was postponed to November 18.

At the "hearing," an informal meeting in Judge Buckner's office, the judge could not locate a file or any papers on Bigford's case. The assistant

district attorney attending the conference, who was unfamiliar with the case, told the Bigfords they could get the truck back - if they paid towing and storage fees, which by then amounted to $700 or $800. When Schaffer replied that Bigford could not afford to pay the fees, Judge Buckner said he could do no more and that the Bigfords would have to work things out with Tommy Hansen, who, it turned out, was away on vacation until December 1. The judge declined to hold another hearing unless Hansen was present together with a representative from the district attorney's office who knew the case.

The Bigfords waited until Tommy Hansen returned, but he merely offered to return the truck if Bigford would pay the storage fees. At this point, it appears, Bigford gave up on Galveston County. He made no further requests for the truck, but instead filed this civil

rights action for damages in February 1983, alleging that the county, Sheriff Taylor, and three deputies had deprived him of his truck in violation of the Fourth Amendment and without due process of law.

In March 1983, in the midst of discovery for their lawsuit, the Bigfords learned that some four months earlier, on December 2, Judge Buckner had ordered the truck returned to them. Neither the Bigfords nor their attorney had been served with notice that judgment had been entered in their favor. The Bigfords did not finally regain possession of the truck, however, until December 1985, fully three years later, after they had obtained a waiver of the storage fees. By that time, the truck had rusted badly, could not be started, and had been damaged when Hurricane Alicia struck the Gulf Coast. It was worth about $100 in scrap value.

The course of this lawsuit is only slightly less confused than the events that occasioned it. The defendants first justified their seizure of the truck on the basis of §49(d) of the Texas Certificate of Title Act, which authorizes impoundment of a vehicle whose driver is arrested for failure to display the required identification numbers.[3] Bigford amended his complaint to include an attack on the constitutionality of this provision. The district court upheld the statute and granted summary judgment. This court reversed and remanded in an unpublished opinion in February 1986, 784 F.2d 1111, pointing out that this section was "patently" inapplicable because the police had never arrested Bigford as the statute required.

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3. Tex. Rev. Civ. Stat. Ann. art. 6687-1, §49(d) (Vernon's 1977).

On remand, the defendants argued that the seizure was authorized under Chapter 47 of the Texas Code of Criminal Procedure, which provides for the seizure and determination of ownership of property "alleged to have been stolen,"[4] even though it appears the police had made no formal allegation that the truck had been stolen. The district court held a bench trial and then entered judgment for the defendants based on its findings of fact and conclusions of law.

The district court ruled that the police had probable cause to seize the truck based on the missing sticker and the indications that the VIN might have been altered. Turning to Bigford's due process claim, the court first found that, because the police had probable cause to seize the truck, due process

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4. Tex. Code Crim. Proc. Ann. art. 47.01 (Vernon's 1979).

required only a post-deprivation hearing. Because the police filed an inventory with the justice of the peace within 24 to 48 hours, the court found, Bigford was accorded an adequate opportunity for a prompt hearing. The court ruled that Bigford had notice that his remedy lay with the courts and that he, therefore, had failed to make use of the remedy provided him. Finally, the court held, the failure, if any, of the justice of the peace to carry out his legal duties could not be imputed to the county or the sheriff's police.

II.

Although Bigford has presented his contention that the seizure was without probable cause as one stitch in the fabric of his due process claim, he has also preserved his claim that the seizure violated the Fourth Amendment. His complaint casts his allegations in that form, among others, and all con-

cerned have analyzed the case employing principles under the Fourth Amendment as well as under the Due Process Clause. Bigford's failure, therefore, to couch his argument on appeal expressly in Fourth Amendment terms does not prevent us from thus addressing it. The district court found that the police had probable cause to seize the truck because its federal safety sticker was missing and its VIN had apparently been altered, concluding that such a vehicle is likely to be stolen.

Bigford and the county here renew their debate over whether the federal safety sticker was required by state law. The answer to this question does not determine whether the police had probable cause to seize the truck. Indeed, the county admits that the issue is not whether the sticker was required but whether its absence, together with

other facts, gave the police probable cause to believe the vehicle or a part of it was stolen.

[1] Probable cause exists "when the facts and circumstances within the arresting officer's personal knowledge, or of which he has reasonably trustworthy information, are sufficient to occasion a person of reasonable prudence to believe an offense has been committed."[5] A showing of probable cause requires much less evidence than does a finding sufficient to convict.[6] Moreover, probable cause is to be determined on the basis of the facts available to the officers at the time, without reference to whether the evi-

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5. *United States v. Forrest*, 620 F.2d 446, 453 (5th Cir. 1980) (*citing Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959)); *United States v. Ashcroft*, 607 F.2d 1167,1170 (5th Cir. 1979).

6. *United States v. Irurzun*, 631 F.2d 60, 62 (5th Cir. 1980) *quoting Ashcroft*, 607 F.2d at 1170).

dence ultimately proved to be reliable.[7] In short, we are not authorized to second-guess the conduct of the police with the benefit of our knowledge, gained from later developments, that the evidence eventually turned out to be unfounded or proved insufficient to show commission of a crime. As the Supreme Court stated in *Brinegar v. United States*, when dealing with probable cause, "we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[8]

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7. *See, e.g., United States v. Covelli*, 738 F.2d 847, 854 (7th Cir. 1984); 1 W. LaFave, *Search and Seizure* 3.2(d) at 575-76 (1987).

8. 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949); *see also Forrest*, 620 F.2d at 453.

[2,3] Nevertheless, the probable cause standard is not entirely toothless. It requires not merely a reasonable suspicion that a crime has been committed,[9] but a reasonable basis under the circumstances for reaching that conclusion and for acting on it. As a corollary, moreover, of the rule that the police may rely on the totality of facts available to them in establishing probable cause,[10] they also may not disregard facts tending to dissipate probable cause.

[4] We agree with the district court that §49(d) of the Texas Certificate of Title Act reflects a legislative judgment that alterations on an identification sticker indicate an increased

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9. *Cf. Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d. 889 (1968).

10. *United States v. Fooladi*, 703 F.2d 180, 184 (5th Cir. 1983); *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977).

likelihood that the vehicle is stolen. The purpose of that Act, as construed by Texas courts, is to stop the purchase and sale of stolen vehicles.[11] Considering the facts known to the police and available to them on reasonable inquiry at the place where the truck was seized, however, officers acting reasonably and prudently on the basis of all the available information, and familiar with the practical considerations of everyday life, would not have concluded that the truck had been stolen. At the time the police seized the truck, the missing sticker, the apparent alterations to the VIN on the door-jamb, and the fact that Sgt. Cook could not find the VIN on the engine block provided at most a basis for further investigation.

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11. *Drake Ins. Co. v. King*, 606 S.W.2d 812 (Tex. 1980); *Guinn v. Lokey*, 151 Tex. 260, 249 S.W.2d 185 (Tex. 1952).

A reasonable police officer would have been placed on notice that further inquiry was indicated when the nationwide computer search produced no report that the vehicle matching either the VIN or the license plates on Bigford's truck had been reported stolen. Although this fact has been held insufficient to render a seizure unconstitutional when probable cause otherwise existed,[12] other authority recognizes it as an important factor militating against a finding that probable cause exists.[13]

Moreover, *State v. Lee*, the state court case that refused to hold that a computer report of "not stolen" dissipated probable cause, presented a different situation. The court there argued that the fact that the computer

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12. *State v. Lee*, 302 Minn. 382, 225 N.W.2d 14 (1975).

13. *United States v. Kelly*, 547 F.2d 82, 84 (8th Cir. 1977).

report indicating that the property - in that case, automobile tires - had not been stolen was "not necessarily a fact to be weighed against the others because if the theft was recent, as the snow on the tires suggested, then it would be unlikely that such a report would have been made by then."[14] In contrast, here the police could not have reasonably dismissed the negative report on the basis that the theft was recent, for as they have admitted all along, they never had any serious suspicion that the young man driving the truck had stolen it or tampered with the identification numbers, or had any idea who had committed those acts.

Minimal further investigation, moreover, would have reduced any suspicion created by the facts the police had discovered. As Tommy Hansen, the

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14. Lee, 225 N.W.2d at 16.

sheriff's department's investigator, testified, it was obvious that the truck had been "just beaten around, beaten to death." It was already rusted and badly in need of paint, and from their brief investigation under the hood, the officers could have seen that the transmission was mounted inside on two-by-fours. The age and condition of this vehicle and its evident lack of value or utility should have been considered, and these facts tended to negate the reasonableness of the conclusion that a truck of such little worth had been stolen. Even apart from the computer report, then, the "suspicious circumstances" that the officers had before them were at least as consistent with the conclusion that the sticker had fallen off and the VIN plate had loosened from heavy wear and tear as they were with the conclusion that the truck had been stolen or wrongfully tampered with.

United States v. Forrest,[15] on which the defendants rely, is clearly distinguishable. In Forrest, the police seized the defendant's truck trailer as he was driving it away from his house, on the suspicion that he was using it to transport stolen eggs. The police had been watching Forrest's home because of an array of facts indicating he was involved in such a scheme. Forrest already had a reputation as a trafficker in stolen goods. He had leased several trailers to a company and had provided false VINs on the trailers in the course of that transaction. He had obtained certificates of title on several of the trailers by presenting false bills of sale to a Florida state agency. Finally, the trailer parked in Forrest's driveway, which the police eventually seized, matched closely the description

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15. 620 F.2d 446 (5th Cir. 1980).

of a trailer stolen in Georgia and believed to have been brought to the area where Forrest lived.

The police in *Forrest* had ample reason to believe a crime was afoot, and no information they received contradicted that belief.[16] Here, considering the contradictory set of facts available to the officers at the time, the seizure of the truck without further inquiry was unreasonable.

III.

That the officers violated the Constitution in seizing Bigford's truck does not, of course, establish that the defendants sued here are liable to Bigford for damages even though a farcical series of blunders followed. Officer Chapa, the district court found, never took any action, but merely stood and watched while Sgt. Cook and Officer

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16. *Id. cf. also United States v. Duckett*, 583 F.2d 1309 (5th Cir. 1978).

Spoor searched and impounded the truck. This finding is not clearly erroneous.

[5] Nor is Sheriff Taylor liable in his individual capacity. Section 1983 does not impose a vicarious or respondeat-superior liability on a police chief.[17] If, as was the case here, the sheriff is not personally involved in the acts causing the constitutional deprivation, the plaintiff must show that some other act by the sheriff caused the violation.[18] The sheriff's connection, if any, will generally be through inadequate supervision, but the plaintiff then must show that such a failure was grossly negligent and that it caused the violation.[19]

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17. *Hinshaw v. Doffer*, 785 F.2d 1260 1263 (5th Cir. 1986) (*citing Reimer v. Smith*, 663 F.2d 1316, 1323 (5th Cir. 1981)).

18. *Id.* (*citing Harvey v. Andrist*, 754 F.2d 569 , 572 (5th Cir. 1985); *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983)).

Bigford has not established either fact. Assuming it might be inferred that Sheriff Taylor had instituted a policy of seizing vehicles based on missing or altered identification stickers, Bigford has not shown that such a policy would itself be unconstitutional or that it caused the violation of his constitutional rights in this case. At most, he has shown that the officers misapplied the policy by seizing the truck without probable cause because the computer reported the truck as not stolen and because the stickers could have been damaged or destroyed through general wear and tear.

[6] For similar reasons, the county is not liable for the officers' actions. The Supreme Court has ruled that a local government unit cannot be held liable under Section 1983 "unless

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19. *Hinshaw*, 78a5 F.2d at 1263; *See also Bowen v. Watkins*, 669 F.2d 979, 988-89 (5th Cir. 1982).

action pursuant to official municipal [or county] policy of some nature" caused the constitutional tort of which the plaintiff complains.[20] In particular, "a municipality cannot be held liable *solely* because it employs a tortfeasor" - that is, on a respondeat superior theory.[21] A tangential relation between government policy and the alleged constitutional violation does not establish liability; the policy must be the "moving force" behind the violation.[22] In the case of a single incident of misbehavior by a municipal employee, the Court, although divided

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20. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1297, 89 L.Ed.2d 452 (1986) (*quoting Monell v. Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978)).

21. *Monell*, 436 U.S. at 691, 98 S.Ct. at 2036.

22. *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981); *Monell*, 436 U.S. at 694, 98 S.Ct. at 2038.

over the precise standard, has made clear that the municipality may not be held liable "merely on evidence of the wrongful actions of a single city employee not authorized to make city policy."[23]

Bigford has failed to establish the existence of a county policy or custom that was the "moving force" behind the illegal seizure of his truck. While the seizure may have taken place pursuant to a policy of impounding vehicles believed to be stolen on the basis of missing or altered stickers, Bigford has not shown that policy was itself unconstitutional, nor has he established that anything in the policy or its administration caused the officers to apply it unconstitutionally in this case. Although

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23. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 2441, 85 L.Ed.2d 791 (1985) (Brennan, J., concurring in part and in the judgment).

Detective Tommy Hansen admitted that vehicles impounded because of suspicious circumstances frequently prove not to have been stolen or tampered with, this alone does not establish that Galveston County officers regularly seize vehicles without probable cause, for probable cause need not involve the degree of certainty necessary to establish a criminal violation. Bigford has, moreover, barely raised, let alone proven, that the illegal seizure resulted from an inadequate training or supervision program by the sheriff's office[24] or from a custom of recklessness in application of the policy of investigating vehicles.[25] Officer Spoor is the only

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24. *See Tuttle*, 471 U.S. at 822-24, 105 S.Ct. at 2436 (Rehnquist, J.); *id.* at 828-33, 105 S.Ct. at 2439-41 (Brennan, J.); *Grandstaff v. City of Borger, Tex*, 767 F.2d 161, 169-70 (5th Cir. 1985).

25. *See Grandstaff*, 767 F.2d at 170-72.

defendant who may be held liable for the illegal seizure.

IV.

We now turn to Bigford's claim that the defendants violated his right to due process by failing to return his truck promptly or with a sufficient hearing. We do not reach its merits, because, even assuming a constitutional violation occurred, none of those who are made defendants to this claim may be held liable.

[7] Sheriff Taylor and Tommy Hansen are not liable as individuals. Once the police had sent the papers regarding Bigford's truck to the justice of the peace, responsibility for the disposition of the vehicle passed from their hands. The district court found that the police delivered the papers to Judge Buckner on July 14, one day after the seizure. This finding of fact is not clearly erroneous. Bigford points

out that the case was not docketed until almost three months later, but ample evidence supports the district court's determination that Judge Buckner had received the file in July and simply had left it sitting on his desk. Bigford raises no issue concerning whether Judge Buckner lacked jurisdiction because only the inventory and no allegation that the vehicle has been stolen was filed, and we therefore intimate no opinion concerning the possible relevancy of that fact.

[8] The district court, in addition, correctly concluded that the county may not bear liability for the magistrate's acts and omissions. Bigford first argues that Judge Buckner's actions themselves may be directly imputed to the county because under Texas law, justices of the peace are high policymaking officials of counties. In *Pembaur v. City of*

Cincinnati,[26] the Supreme Court ruled that a county may be held liable when the county official whose policy decision the plaintiff challenges is "responsible for establishing final policy with respect to the subject matter in question."[27] Before *Pembaur*, this court had emphasized that policy-making authority under *Monell* "is more than discretion, and it is far more than the final say-so, as a matter of practice."[28] The official must have "the authority to define objectives and choose the means of achieving them," not merely the latitude to exercise discretion in pursuing objectives and employing means set by other agents - a

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26. 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

27. *Id.* at 483-84, 106 S.Ct. at 1300.

28. *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir 1984) (en banc).

latitude "essential even to virtually ministerial tasks."[29]

The county judge of a Texas county may possess such policymaking authority in some matters, as this court intimated in *Familias Unidas v. Briscoe*.[30] As the court there noted, the Texas constitution and statutes give the county judge numerous executive, administrative, and legislative chores, such as presiding over the county's legislative body, preparing the county budget, and conducting elections, with "virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute" and accountability to "no one other than the voters for his conduct therein."[31] The

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29. *Rhode v. Denson*, 776 F.2d 107, 109 (5th Cir. 1985).

30. 619 F.2d 391 (5th Cir. 1980).

31. *Familias Unidas*, 619 F.2d at 404.

court concluded that "at least in those areas in which he, alone, is the final authority or ultimate repository of county power," the county judge was a policymaker whose official conduct and decisions could be attributed to the county under section 1983.[32]

Judge Buckner, however, was not the Galveston County Judge, but a justice of the peace for one precinct of the county. His job is to adjudicate various small claims such as the question of vehicle ownership presented here, and it does not involve any of the policymaking functions assigned to the county judge.

In *Familias Unidas*, moreover, the particular statute authorizing the judge to act also so narrowed his discretion that, with respect to the subject matter in question, he was effectuating the

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32. *Id.*

policy of the State of Texas, not making policy under a standardless grant of authority.[33] The responsibility of the justice of the peace in determining ownership of a vehicle alleged to have been stolen is similarly circumscribed by state law. Article 47.01a of the Texas Code of Criminal Procedure, which governs when no criminal charges are pending and under which Judge Buckner apparently proceeded in this case, provides that, after hearing held on petition of any interested person, "[t]he magistrate shall order the property delivered to whoever has the superior right to possession." While the justice of the peace clearly has de facto discretion over how the cases on the court's docket are to be handled, "policymaking authority is more than

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33. *Id.*; *see also Carbalan v. Vaughn*, 760 F.2d 662, 665 (5th Cir. 1985).

discretion, and it is far more than the final say-so, as a matter of practice."[34] Judge Buckner was charged with carrying out Texas's policy that vehicles be delivered, after a hearing, to the rightful owner. His "deliberate or mistaken departure from the controlling law" cannot be said to represent county policy.[35]

[9] In addition to arguing that Judge Buckner denied due process by failing to convene a prompt hearing, Bigford makes a second claim: that the county should have provided him an opportunity to regain possession of his truck by posting an appearance bond. He relies on this court's decision in *Breath v. Cronvich*,[36] which upheld Louisiana's statute for towing of

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34. *Bennett*, 728 F.2d at 769.

35. *Pembaur*, 475 U.S. at 486, 106 S.Ct. at 1302 (White, J. Concurring).

36. 729 F.2d 1006 (5th Cir. 1984).

illegally parked vehicles in part because the statute afforded such a procedure. We regard this as, in substance, a facial attack on the constitutionality of Tex. Code Crim. Proc. arts. 47.01-11, which offer no such option to the driver of a vehicle that is alleged to have been stolen.

Bigford's challenge, construed in this light, raises the question whether implementation of a facially unconstitutional state statute, assuming this statute is so, by the county officers charged with implementing it amounts to a county "policy" under *Monell* and subsequent cases. This court has reached somewhat conflicting results on this issue. In *Familias Unidas*, the court refused to hold the county liable for the conduct of a county judge, holding that the judge's action, "like that of a county sheriff in enforcing a state law, may more fairly be characterized as the

effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility."[37]

In *Crane v. State of Texas*,[38] however, the court held the county liable when its District Attorney instituted a practice of issuing misdemeanor capiases without a neutral magistrate's finding of probable cause. The court distinguished *Familias Unidas* on two grounds. First, in *Familias Unidas* the defendants had complied with the state statute and should not have faced liability merely because that statute was eventually declared unconstitutional. Second, the judge in *Familias Unidas* was not, under state law, vested with the amount of policymaking discretion that the dis-

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37. 619 F.2d at 404.

38. 759 F.2d 412 (5th Cir. 1985).

trict attorney had concerning county law enforcement procedures.[39]

Familias Unidas, rather than *Crane*, controls here. Bigford challenges the failure to provide him the option of posting a bond. Although the magistrate may have breached his state-law duty in failing to set a hearing, he did not violate state law in failing to offer Bigford the bond procedure, for arts. 47.01-11 themselves authorize no such procedure. As already noted, moreover, the magistrate is not a county policy-maker concerning the matter in question, but is carrying out the policy of the State of Texas.

Finally, although Bigford presented some evidence that Sheriff Taylor was aware of the delay in returning the truck and did nothing to resolve it, the sheriff was not the county's policymaker

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39. *Crane*, 759 F.2d at 430 n. 19.

as to such judicial matters, as opposed to law enforcement matters. There is no evidence that the county's governing body or other high officials approved or were even aware of the magistrate's failure to act.[40]

Because Bigford has failed to establish that the county may be held liable for the delay in resolving the matter and returning the truck, and the other defendants cannot be charged for the magistrate's failures, Bigford may not recover damages on his due process claim. We therefore do not consider whether Bigford was denied due process or whether he had adequate notice of the remedies available to him and simply failed to use them.

V.

Because the police violated Bigford's constitutional rights by

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40. *See Carbalan*, 760 F.2d at 664.

seizing his truck without probable cause, we remand to the district court to determine the damages to be assessed against Deputy Spoor, the only defendant liable under Section 1983.

The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED. Deputy Spoor is to pay Bigford's costs, while Bigford is to pay the other defendants' costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C.A. G-83-54

WILLIE LEE BIGFORD

v.

JOE MAX TAYLOR, ET AL

FINAL JUDGMENT

The Court having filed its finding of fact and conclusions of law herein directing the entry of judgment in favor of the defendants and against the plaintiff, it is

ORDERED, ADJUDGED and DECREED that the plaintiff TAKE NOTHING from defendants JOE MAX TAYLOR, individually and in his official capacity as Sheriff of Galveston County, Texas, KENNETH SPOOR, ART CHAPA, and TOMMY HANSEN, individually and in their official capacities as Deputy Sheriff of Galveston County, Texas.

This is a FINAL JUDGMENT.

DONE at Galveston, Texas, this the 5th day of March, 1987.

/s/ HUGH GIBSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C.A. G-83-54

WILLIE LEE BIGFORD

v.

JOE MAX TAYLOR, ET AL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the parable *Before the Law*, Frank Kafka wrote of a man who seeks admittance to "the Law" but perpetually finds his way barred, though he is informed that he may possibly be allowed to enter some day. Try as he might, the man is neither able to find out why he is denied entrance to the Law nor what he must do to gain it. He vainly fritters away his life in this way. Lamentably, *Before the Law* stands not only as an existential parable of alienation, but as a specific parable about the suit of Willie Bigford, Jr.

Mr. Bigford sues Joe Max Taylor, individually and in his official

capacity as Sheriff of Galveston County, Texas, and Kenneth Spoor, Art Chapa, and Tommy Hansen, individually and in their official capacities as Deputy Sheriffs of Galveston County. Plaintiff's claim is simple: defendants deprived him of his truck without due process of law. He brings this claim pursuant to 42 U.S.C. §1983. The Court held a non-jury trial with the consent of the parties on January 12, 1982. The Court concludes that in spite of the fact that plaintiff met a complete lack of cooperation and competence at every turn, the defendants did not deny plaintiff of (sic) due process. The Court rules that plaintiff take nothing from defendants and makes the following Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52:

Findings of Fact

1. Early on the morning of July 13, 1982, plaintiff Willie Bigford, Jr.

parked his 1977 Chevrolet pickup truck on the shoulder of FM 1764 in Galveston County, Texas. Mr. Bigford was eighteen years old and the truck was his first motor vehicle. Mr. Bigford's truck had just run out of gas. He decided to wait in the truck for the nearest gas station to open and lay down on the truck seat. The truck thus appeared unoccupied when Deputies Spoor and Chapa first observed the truck. Deputy Spoor testified that he stopped to check the "welfare of the truck."

2. The deputies approached the truck and found plaintiff inside the truck. Deputy Spoor asked plaintiff to step out of the truck. Deputy Chapa was merely an observer during the following sequence of events. While the door was open, Deputy Spoor noticed that the Federal Inspection Safety Sticker (FISS), which is required to be affixed to the vehicle body facing the end of

the door, was missing. the area where the FISS is required to be affixed is in plain view when the vehicle driver's side door is open. Further investigation indicated that the Vehicle Identification Number (VIN) plate appeared to have been tampered with and that the VIN number stamped into the frame appeared to have been effaced. Tampering with these identification numbers are normally indicia of a stolen vehicle. However, Deputy Spoor had, by radio, been informed that the truck was not listed as stolen.

3. Deputy Spoor seized the truck and had it towed to a private towing yard. He did not ask plaintiff if the truck had been stolen or if plaintiff had proof of ownership. Plaintiff possessed a certificate of title that the previous owner of record had endorsed to him.

4. Deputy Spoor told plaintiff to ride with him in the patrol car to the station, where he could telephone his parents. At the station, Captain Lease questioned plaintiff for a short time. According to defendants Spoor and Lease, plaintiff was not arrested. Plaintiff testified that he did not believe that he was being detained.

5. Captain Lease completed an inventory of the vehicle and its contents and took the inventory to the district attorney for his signature. On July 14, 1986, the district attorney delivered the inventory to the Galveston County Justice's Court, Precinct No. 4, Judge J. E. Buckner presiding. The inventory was not docketed by the Court until sometime between October 13, 1982 and October 21, 1982. Plaintiff was never served with any notice or citation concerning his truck.

6. Over the next two weeks Mr. Bigford and his parents repeatedly contacted Captain Lease; Deputy Tommy Hansen, the officer conducting the investigation; and Sheriff Joe Max Taylor. Essentially, they were told that the investigation was incomplete and that they would be contacted when it had been established whether the truck was stolen. Captain Lease indicated that this should take approximately thirty days. In fact, it took defendants approximately two months to conclude that the truck had not been stolen.

7. On July 28, 1982, Tommy Hansen told Mr. Bigford to retain a lawyer because the truck had been "turned over" to the courts. Plaintiff retained two lawyers over the next six weeks. Neither took any action.

8. Sometime during the week of September 20, 1982, the Bigfords determined, as a result of their own

investigations, which court had jurisdiction over the truck and contacted Judge Buckner. The Judge met with the Bigfords and told them that they needed to retain a lawyer who then could petition for a hearing to obtain possession of the truck.

9. The Bigfords, the judge, and the assistant district attorney met the following day. At this and the previous meeting the judge indicated that there was nothing he could do to help.

10. Plaintiff retained attorney Kent Schaffer in October 1982. Mr. Schaffer first contacted the district attorney and unsuccessfully attempted to obtain the release of the truck.

11. Mr. Schaffer then represented Mr. Bigford at the conference held by Judge Buckner on November 18, 1982. The court could not locate a case file or any papers on the Bigford case. An assistant district attorney who was not

familiar with the case indicated that Mr. Bigford could obtain his truck by paying the towing and storage fees (approximately $700 - $800). Mr. Schaffer represented to the judge that Mr. Bigford could not afford to pay that much and the judge indicated that Mr. Bigford would have to work things out with the district attorney and Deputy Hansen, who was out of town until December. Mr. Schaffer requested a hearing but Judge Buckner told him that they could not have one without the investigating officer, Tommy Hansen, or the district attorney familiar with the case.

12. Plaintiff did not again demand a hearing, never petitioned for a hearing, and never sought a writ of mandamus to compel the judge to hold one.

13. Neither Plaintiff or Mr. Schaffer were notified of any further

hearings or conferences.

14. Judge Buckner executed a "Transcript of Judgment" on March 2, 1983 which indicated that the "date of Judgment" was December 2, 1982. Neither the Bigfords nor their attorney were served with any notice that judgment was entered.

15. After Plaintiff filed this suit in February 1983, the county attorney told plaintiff that he would first have to pay the fees before the truck could be released. The truck was released to plaintiff, without his paying the fees, in December 1985.

16. The value of the truck and its contents before the seizure was between $1,300 and $2,000. While stored, the truck was allowed to deteriorate and defendant Hansen cut a hold in the floor of the cab during the investigation. When the truck was finally returned to

plaintiff it not (sic) longer ran and its value was approximately $100.

Conclusions of Law

1. This Court has jurisdiction over this §1983 action pursuant to 28 U.S.C.§1343.

2. Defendants Spoor and Chapa had reasonable grounds to stop and investigate a vehicle that appeared abandoned on the side of the road. When they discovered that plaintiff was asleep in the vehicle, no constitutional violation resulted from asking plaintiff to step out of the vehicle; from viewing the area where the FISS is required to be located, which is in plain view when the door is open; or from examining the truck for the purpose of inspecting the identification numbers. *See United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980); *United States v. Duckett*, 583 F.2d 1309 (5th Cir. 1978).

3. Deputy Spoor had probable cause to seize it based on the missing and tampered with identification numbers. Texas law prohibits possessing a vehicle that has had the required identification numbers "removed, changed, or obliterated." Tex. Rev. Civ. Stat. Ann. art. 6687-1, §49 (Vernon's 1977). The FISS and VIN numbers are required by Texas Law. *Id.* Such a vehicle is likely to be stolen, which, in fact, is why the legislature enacted article 6687-1.

4. Plaintiff was not arrested. The evidence established that Captain Lease briefly questioned plaintiff but that plaintiff was at no time detained or believed himself detained against his will.

5. Defendants' seizure of plaintiff's truck, which plaintiff owned and possessed, deprived plaintiff of his property.

6. Defendants, however, did not deprive plaintiff of his property without due process. When, as here, a vehicle is seized based upon probable cause, due process only requires an adequate post-seizure hearing. *See Breath v. Cronvich*, 729 F.2d 1006, 1010 (5th Cir. 1984), *cert. denied*, 469 U.S. 934.

7. Such a hearing, in Texas, is provided by the courts, not the sheriff. Chapter 47 of the Texas Code of Criminal Procedure, Tex.Code Crim.Proc.Ann. arts. 47.01-.11 (Vernon's 1979), sets forth the procedure:

> a. The law enforcement officer files a schedule of the seized property with the magistrate court;
>
> b. he holds the property "alleged to have been stolen" subject to order of the magistrate or court;
>
> and
>
> c. an interested party petitions the magistrate or court for possession of the property.

This procedure is essentially the same

as the procedure required by Tex.Rev.Civ.Stat.Ann. art. 6687-1, §49 (Vernon's 1977), under which defendants mistakenly proceeded.

8. Plaintiff had actual notice that his remedy lay with the courts. Plaintiff had adequate legal notice of the published statutory procedures. *See Breath*, 201 F.2d at 1011.

9. Because there was probable cause for the seizure and inventory was filed within 24 to 48 hours of the seizure, defendants did not deprive plaintiff of his property without due process. The Court need not speculate concerning whether the post-seizure hearing would have comported with due process because plaintiff never petitioned for such a hearing. But to the extent that plaintiff's oral requests for possession were a petition, the failure of the magistrate to carry out his legal duties cannot be imputed

to defendants. *Cf. Barker v. Norman*, 651 F.2d 1107, 1131 n.27 (5th Cir. 1981) (stating in dictum that arguably there is "no denial of due process for an officer to retain property alleged to have been stolen until after the claimant has availed himself of the mechanisms provided by state law to establish his entitlement to the property.").

10. Accordingly, the Court concludes that plaintiff take nothing from defendants.

11. If any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. If any of the foregoing conclusions of law constitute finding of fact, they are adopted as such.

DONE at Galveston, Texas, this the 5th day of March, 1987.

/s/ HUGH GIBSON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2123

WILLIE BIGFORD, JR.,
Plaintiff-Appellant,
Cross-Appellee,

v.

JOE MAX TAYLOR, Individually and as
Sheriff of Galveston County,
Texas, ET AL.,
Defendants-Appellees.

v.

O. M. STOKES TERRY, d/b/a
Stokes Wrecker Service,
Defendant-Appellee, Cross-Appellant.

Appeals from the United States District
Court for the Southern District of Texas

(February 24, 1986)

Before GOLDBERG, RANDALL and JOHNSON,
Circuit Judges.

PER CURIAM: * Unpublished

Willie Lee Bigford, Jr., appeals from a district court's decision granting defendants' motion for summary judgment. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Plaintiff-appellant Willie Lee Bigford, Jr., was driving along FM 1764 in Galveston County, Texas, in July, 1982, when his pickup truck ran out of gas. Bigford pulled onto the shoulder of the road and parked the truck. Officer Kenneth Spoor of the Galveston County Sheriff's Department saw the truck, became suspicious, and stopped to investigate. At the time, Bigford was asleep on the front seat. When Spoor saw him, he asked Bigford to get out of the truck, and when Bigford opened the door to do so, Spoor noticed that the vehicle lacked a required inspection sticker which is frequently removed from stolen vehicles.

Spoor did not arrest Bigford. In fact, at no time during this protracted problem involving Bigford's pickup has Bigford been arrested for or charged with any violation. Nevertheless, the Sheriff's Department seized the truck, filled out certain inventory forms recording the seizure, and delivered to the office of Judge James Buckner the papers which indicated that the truck had been seized. Three months later, Judge Buckner's office assigned a docket number to the case, and the following December -- over five months after it was taken -- the truck was ordered returned to Bigford.

In the meantime, the gasless truck had been collecting storage fees on the lot of O. M. Stokes Terry d/b/a Stokes Wrecker Service. At the request of the Galveston County Sheriff's Department, Stokes had towed Bigford's truck to her lot. When Bigford went to claim the

truck and was informed of the charges which had accrued, he was unwilling to pay.

Bigford filed suit in February, 1983, naming as defendants various members of the Galveston County Sheriff's Department (hereinafter "Galveston County"). Subsequently, Bigford amended his complaint to name as a defendant Stokes Wrecker Service. Bigford and Stokes have since settled, so all that remains is Bigford's suit against Galveston County.

Bigford's original complaint asserted that the seizure of his truck violated the Fourth, Fifth, and Fourteenth Amendments by denying him due process. Following Galveston County's original answer, Bigford added to his complaint an attack on the constitutionality of Tex. Rev. Civ. Stat. art. 6687-1 § 49(d), which

provided,[1] in part, as follows:

> *If a person is arrested* for possession of a motor vehicle or part of a motor vehicle in violation of this section [involving altering, forging, or removing motor vehicle certificates or numbers], the arresting officer will take the motor vehicle or part of a motor vehicle into his possession.

Tex. Rev. Civ. Stat. art. 6687-1 §(d)(1) (emphasis added). The district court upheld the constitutionality of §6687-1 §49(d) in June, 1984, and re-affirmed this same holding following Bigford's motion to reconsider. Accordingly, Bigford's challenge to the constitutionality of this statute

---

1. In 1983, after Bigford's truck was taken, § 49(d)(1) was amended to allow for peace officers to seize a vehicle, irrespective of whether an arrest is made, if the officer discovers that the "vehicle has had the serial number, motor number, or manufacturer's permanent i.d. number removed, changed, or obliterated." This amendment, which does not substantively affect Bigford's claim growing out of a 1982 seizure, does elucidate the prior version's condition that an arrest precede seizure.

dropped out of the complaint, leaving him with a due process challenge to the seizure of his truck.

Galveston County's motion for summary judgment, filed in November, 1984, claimed that the seizure of Bigford's truck had been proper under the statute which had already been deemed constitutional by the district court, and further asserted that Galveston County had notified Bigford that his truck had been impounded and that he was entitled to a hearing on the validity of the seizure. Bigford's response renewed his attack on the constitutionality of art. 6687-1 §49(d). Yet, recognizing that the district court had twice considered this contention, Bigford repeated the basis of his original complaint, asserting "that he was not afforded an adequate post-towing hearing and that this violates his right to due process." Specifically, Bigford

explained that he "still challenges defendant's failure to provide notice of a right to hearing and defendant's inordinate delay in providing a forfeiture hearing." Finally, Bigford flatly denied, in deposition testimony attached to his answer to Galveston County's motion, that he had ever been informed of his right to a hearing to contest the seizure of his truck or apprised of the procedure by which such a challenge could be mounted.

In granting Galveston County's motion for summary judgment, the district court assumed that Bigford's truck had been seized under the statutory authority of art. 6687-1 §49. The court then reasoned that under the statute, "the responsibility of the law enforcement agency ends with the preparation of an inventory of the impounded vehicle. By statute, the responsibility to provide plaintiff with

notice of his right to reclaim the vehicle rests with the magistrate and *not* the law enforcement agency" (emphasis in original).

On appeal, Bigford has again focused his greatest attention on the alleged deficiencies of art. 6687-1 §49. This strategy is mystifying given the patent inapplicability of the assailed provision: Bigford was never arrested -- yet only an arrest could trigger application of the statute as it existed in 1982. Perhaps recognizing precisely this point, Galveston County has shifted its own position, and now attempts to assert that the seizure was authorized under sections of Texas law never brought to the attention of the district court. We decline to consider the hypothetical workings of a statute the existence or relevance of which was never considered by the district court. Instead, we limit our review to the

question of whether summary judgment was appropriate with respect to Bigford's due process challenge.

II. DISCUSSION.

Given the inapplicability of art. 6687-1 §49, the decision granting summary judgment which relied almost entirely[2] on the constitutionality of the statute cannot stand. Bigford's fundamental complaint -- which has been greatly obfuscated by counsels repeated and irrelevant skirmishes concerning

---

2. The district court also stated that under *Parratt v. Taylor*, 451 U.S. 527 (1981), Bigford's complaint stated no cause of action under the due process clause. However, before *Parratt* is implicated, it is necessary that the state actor, here Galveston County, have acted in a manner not authorized by some established state procedure. *Parratt*, 451 U.S. at 543. Given the court's implicit assumption that the seizure was authorized by Texas law, the reliance on *Parratt* is inappropriate. Moreover, *Parratt* applies only when there is available to a plaintiff a constitutionally adequate state law remedy. The availability to Bigford of an adequate state law remedy was never an issue below.

art. 6687-1 -- is simply that Galveston County seized his truck and then failed either to return the vehicle promptly or give Bigford prompt notice that he was entitled to a hearing.[3]

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). Most fundamentally, due process guarantees "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Eldridge*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380

3. Galveston County did suggest to the district court that the seizure was also authorized by Tex. Rev. Civ. Stat. art. 6687-2(f). The district court did not mention this statute, perhaps because it seems clearly to apply only to salvage dealers. We do not believe that art. 6687-2(f) applies to Bigford, and in any event, the district court's decision made no mention of this provision.

U.S. 545, 552 (1965)). There can be no doubt that the seizure by Galveston County of Bigford's truck, upon which Bigford relied to travel to and from work, and the seizure of which in part caused Bigford to quit his job, constituted a taking of property and implicated Bigford's due process rights. See, *e.g.*, *Breath v. Cronvich*, 729 F.2d 1006, 1011 (5th Cir. 1984) ("When a car is towed or impounded, some form of fair and impartial hearing at which an owner is provided an opportunity to challenge the lawfulness of removing his car and assessing charges against him must be provided within a reasonable time period.") *Stypman v. City of San Francisco*, 557 F.2d 1338 (9th Cir. 1977) (noting that seizure of an automobile "without prior hearing has been sustained only where the owner is afforded prompt post-seizure hearing"); *Lee v. Thornton*, 538 F.2d 27 (2d Cir.

1976) (stating that while Congress may provide for seizure of vehicles suspected of being involved in customs violations, there must be an opportunity for a prompt hearing).

III. CONCLUSION.

We conclude that the seizure of Bigford's truck constituted a taking of his property which therefore triggered Bigford's right to procedural due process. The statute which purportedly justified this seizure did not in fact apply to Bigford. The merits of Bigford's basic due process challenge must be addressed. Accordingly, the decision granting the defendant's motion for summary judgment is reversed.

REVERSED AND REMANDED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-83-54

WILLIE BIGFORD, JR.,

vs.

JOE MAX TAYLOR ET AL

MOTION CONFERENCE
(Held May 14, 1984)

Counsel appeared before the Court in Chambers to argue Plaintiff's motion to amend his original complaint. Counsel for Plaintiff moved to amend to include in his complaint his constitutional challenge of Vernon's Ann. Civil Stat., Article 6687-1, Section 49(d). Plaintiff further requested that the Court comply with 28 U.S.C. §2403(b), which requires certification of matters to the Attorney General of the State, allowing intervention by the State to argue the constitutionality of said State statute.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's motion to amend complaint is GRANTED;

2. Plaintiff's request for certification to the Attorney General is denied. The notice requirement of 28 U.S.C. §2403(b) applies only when neither the State, nor any agency, official, or employee thereof, is a party to the suit. *Sovereign News Co. v. Falke*, 448 F. Supp. 306 (N.D. Ohio 1977); *Latino Political Action Committee V. City of Boston*, 716 F.2d 68 (1st Cir. 1983).

This Court is under no obligation to notify the State Attorney General where county officials are already parties to this action, since under Texas law, counties are political subdivisions operating as agencies of the State. *Rodriguez v. Medical Arts Hospital*, 437 F.2d 1203 (5th Cir. 1971).

3. The Court's Docket Control Order is amended to defer trial date for sixty (60) days from June 4, 1984;

4. Within ten (10) days from May 14, 1984, Plaintiff shall submit a brief outlining his authority to support his constitutional challenge; and

5. Within fifteen (15) days from May 14, 1984, defendants shall submit a responding brief summarizing their authority to support the constitutionality of the relevant State statute.

DONE at Galveston, Texas, this 21st day of May, 1984.

/s/ HUGH GIBSON
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-2334

D.C. DOCKET NO. CA-G-83-54

WILLIE BIGFORD, JR.,
Plaintiff-Appellant,

v.

JOE MAX TAYLOR, Individually and as
Sheriff of Galveston County,
Texas, ET AL.,
Defendants-Appellees.

Appeal from the United States
District Court
for the Southern District of Texas

Before CLARK, Chief Judge, GEE, and
RUBIN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record and on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee Deputy Spoor pay to plaintiff-appellant his costs on appeal, and that plaintiff-appellant pay to the other defendants-appellees their costs on appeal, to be taxed by the Clerk of this Court.

January 5, 1988

ISSUED AS MANDATE:

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-2334

WILLIE BIGFORD, JR.,
Plaintiff-Appellant,

v.

JOE MAX TAYLOR, Individually and as Sheriff of Galveston County,Texas,ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

ON PETITIONS FOR REHEARING
(March 10, 1988)

Before CLARK, Chief Judge, GEE and RUBIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/s/ ALVIN B. RUBIN
United States Circuit Judge

Supreme Court, U.S.
FILED
JUL 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-103

In The

Supreme Court of the United States

October Term, 1987

WILLIE BIGFORD, JR.

Petitioner,

vs.

JOE MAX TAYLOR, ET AL.,

Respondents.

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GALVESTON COUNTY LEGAL DEPT.

SCOTT LYFORD
4127 Shearn Moody Plaza
123 25th Street
Galveston, Texas 77550
(409) 766-2348

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 88-103

In The

Supreme Court of the United States

October Term, 1987

WILLIE BIGFORD, JR.,

Petitioner,

vs.

JOE MAX TAYLOR, ET AL.,

Respondents.

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT:

The respondents, Joe Max Taylor et al., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case, reported at 834 F.2d 1213 in *Bigford v. Taylor.*

STATUTORY PROVISIONS INVOLVED

Chapter 47 of the Texas Code of Criminal Procedure provides, in pertinent part:

> Art. 47.04 Upon an examining trial, if it is proven to the satisfaction of the magistrate that any person is the true owner of property alleged to have been stolen, and which is in possession of a peace officer, he may upon motion by the state, by written order direct the property to be restored to such owner subject to the conditions that such property shall be made available to the state or by order of any court having jurisdiction over the offense to be used for evidentiary purposes.
>
> Art. 47.05 If the magistrate has any doubt as to the ownership of the property, he may require a bond of the claimant for its redelivery in case it should thereafter be shown not to belong to such claimant . . .

STATEMENT OF THE CASE

Just after dawn on July 13, 1982, in a rural area of Galveston County, Sheriff's deputy Kenneth Spoor observed a pickup truck beside the road (PX #21, p.11). Approaching the vehicle, which appeared to be abandoned, Spoor discovered Willie Bigford, Jr. lying in the cab (*Id.* p.6). Spoor knocked on the window and Bigford got out (*Id.* p.10).

When Bigford opened the door Spoor noticed a required Federal Inspection Safety Sticker (FISS) was missing (*Id.* p.6,12). He notified his supervisor, as he had been trained (*Id.* p.14,17). Sergeant Cook arrived, and from that point on Spoor was "following his orders" (*Id.* p.14,36).

Cook inspected the pickup (*Id.* p.14). He found someone had tampered with the rivets attaching the plate containing the Vehicle Identification Number (VIN) (*Id.*

p.14-15). He tried to locate the VIN numbers on the frame and could not (*Id.*). Spoor meanwhile ran a computer search on the VIN number from the plate, as well as the license plate number, which listed neither as reported stolen (*Id.* p.15,17-18).

Cook called Captain Ray Lease, who was well aware that even if neither the VIN nor the license was stolen, the vehicle to which they were attached could be (Tr. 171-172). Lease ordered the vehicle towed to the North Galveston County Building, where he was (PX #21 p.15-16).

At the North County Building Lease directed further inspection of the vehicle (PX #21 p.19). He concluded the FISS was missing, the rosette rivets holding the VIN plate on the door jamb tampered with, the engine number removed, and he could locate no VIN on the frame (PX #23 p.8-9). The option sheet normally located in the glove box was missing, as was the one normally found under the seat (*Id.* p.11). He ordered the truck seized because in his opinion the truck had definitely been altered (*Id.* p.10), and further investigation was needed to determine if all or part of the truck was stolen (*Id.* p.31). Following the seizure, control of the truck was turned over to a justice of the peace for the precinct within the County where the seizure occurred. Bigford failed to secure an order returning the truck to him for over five months, at which time the storage charges were more than he wanted to pay.

Bigford sued Kenneth Spoor and Art Chapa. Spoor's acts are set out above. Chapa was simply a new deputy riding with Spoor that morning who did nothing but watch the proceedings. Bigford also sued Sgt. Tommy

Hansen and Sheriff Joe Max Taylor. Hansen was the officer assigned to investigate Bigford's truck following its seizure. Taylor is the elected Sheriff of Galveston County, the official entity which Bigford sued.

The Court of Appeals found that Spoor was liable to Bigford for the wrongful seizure of the vehicle, but refused to consider the due process questions raised since none of the defendants could be liable to Bigford for the violations he alleged. No County policy was shown which resulted in a denial of due process, and none of the individual defendants was directly involved in the duties of the justice of the peace to provide Bigford with a hearing or set a bond for the return of his truck.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Bigford advances two arguments in support of his application for a writ of certiorari. First, he argues that the Court of Appeals failed to consider the constitutionality of Chapter 47 of the Texas Code of Criminal Procedure, which establishes one of the State's procedures provided for persons asserting an interest in property which the police have seized.

Second, he suggests that the Court erred in concluding that the evidence did not reveal any County policy which caused the violation of his rights. Neither of these contentions is accurate, and neither provides sufficient grounds for this Court's review of the decision below.

A. THE CONSTITUTIONALITY OF CHAPTER 47

Bigford contends that the decision of the Court of Appeals is in conflict with this Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986). In that case this Court concluded that a single decision by a policymaker could result in liability being imposed upon a County. It relates in no way to the facts of this case.

No County policy shown by state law.

In maintaining that a County policy is established by virtue of the existence of Chapter 47 of the Texas Code of Criminal Procedure, Bigford relies upon a part of Justice O'Conner's concurring opinion in *Pembaur*, wherein it is stated

> Given that this procedure was consistent with federal, state and local law at the time the case arose, it seems fair to infer that respondent county's policy was no different.

The procedure referred to was the unconstitutional entry into the doctor's office, which was explicitly authorized by the County Attorney. The fact that this decision was consistent with then existing state law merely added weight to the argument that the decision was a policy making act, by an officer authorized to make policy. The act of the County Attorney created county policy, not an act of the state.

In contrast, the policy which Bigford complains of is the alleged failure of Chapter 47 to provide a procedure which would have allowed him to obtain his vehicle by posting a bond. Even if the State Legislature had failed to

place a bonding provision in Chapter 47 (and it did not, see *infra*), that failure could not be attributed to County policy.

There was no decision by a County policymaker.

The evidence was of Bigford's dealings with a justice of the peace within one of the County precincts. This justice, the lowest level of magistrate within the County, was not a County policymaker. As the Court of Appeals correctly concluded,

> (h)is "deliberate or mistaken departure from the controlling law" cannot be said to represent county policy.

Bigford v. Taylor, 834 F.2d 1213,1222 (5th Cir. 1988), citing *Pembaur*, 475 U.S. at 486, 106 S.Ct. at 1302. He is simply carrying out the policy of the State of Texas in complying with the statutes in question. Thus even if Bigford were complaining of an act of this judge's failure to comply with state law, that failure cannot be said to represent County policy.

Chapter 47 contains a bonding procedure.

The most confusing part of Bigford's position, and the opinion of the Court of Appeals for that matter, is the suggestion that Chapter 47 does not contain a procedure for posting a bond to obtain property which has been seized. *Bigford*, supra, at 1223. Articles 47.04 and 47.05, quoted above, clearly provide that a magistrate is empowered to deliver property to a claimant conditioned upon the claimant's posting of a bond. Both statutes were

adopted in 1965 and were in effect at the time of Bigford's dealings with Judge Buckner.

Bigford did not challenge the constitutionality of Chapter 47.

Perhaps the rather cursory manner in which the Court of Appeals dealt with the constitutional challenge resulted from the fact that it was an issue created by the Court itself, not by the parties. Bigford did not complain of the constitutionality of Chapter 47 before the trial court at the time of his second trial, nor did he raise such an issue on appeal. On the contrary, the Court construed his suggestion that the officers should have provided him a bonding procedure "as, in substance, a facial attack on the constitutionality of Tex.Code Crim.Proc. arts. 47.01-11;" *Bigford*, supra at 1222.

Thus Bigford did not directly raise a constitutional challenge before either the trial court or the Court of Appeals. His suggestion now that the Court erred in failing to certify the constitutional challenge to the State of Texas pursuant to 28 U.S.C. 2403(b) fails to demonstrate in any way how he has been prejudiced, especially since the basis for the Court of Appeals's "assumption" of unconstitutionality is erroneous.

B. ALLEGED COUNTY POLICY

Bigford argues that "Galveston County had a fixed plan of action to be followed for impounding vehicles on the basis of missing FISS stickers;" *Petition*, at p. 17. That

assertion is totally unsupported, as shown simply by looking at the facts set forth in Bigford's application.

The missing Federal Safety Inspection Sticker (FISS) was what prompted Officer Spoor to call a supervisor, Sgt. Cook. Cook found that the rivets holding the VIN plate on the door frame had been tampered with, and he could not locate the VIN number on the frame. He also thought the truck's body did not appear to match the frame.

At that point Cook had the vehicle towed to the North County Building for further investigation[1], which was, according to the Court of Appeals, all that was authorized; *Bigford*, at 1219. Further inspection revealed that the engine number had been removed and the option sheets normally found in two places were missing. Captain Lease ordered the truck seized because in his opinion it had definitely been altered.

This was the evidence presented by Bigford. It does not even suggest that there is any policy in Galveston County of seizing vehicles solely on the basis of missing FISS stickers. A missing sticker means simply, as Spoor testified, that a knowledgeable supervisor must be called to conduct an investigation.

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[1] It is revealing to note that Bigford confirms Spoor's contention that this is what happened; *Petition*, at 15. The Court of Appeals concluded that Spoor had the truck towed directly to a storage yard, on his own authority; *Bigford*, supra, at 1216. Bigford obviously agrees with Spoor's contention that he did not authorize the seizure but merely followed his supervisor's directions; see Docket No. 87-1960, Petition for Writ of Certiorari filed in this Court by Kenneth Spoor, petitioner.

There was no evidence presented as to other seizures. The testimony of Hansen that impounded vehicles frequently prove not to be stolen does not, as the Court of Appeals correctly concluded,

> establish that Galveston County officers regularly seize vehicles without probable cause.

Bigford, at 1221. That testimony alone does not establish any policy of Galveston County which resulted in the seizure of Bigford's truck, let alone a policy of seizing vehicles without probable cause.

CONCLUSION

Bigford fails to demonstrate any conflict between the decision of the Court of Appeals and prior decisions of this Court. His complaint as to the constitutionality of Chapter 47 of the Texas Code of Criminal Procedure was not raised at trial nor in the Court of Appeals, and the complaint he now raises does not correctly portray the statute. Finally, his arguments as to County policy are simply not supported by the evidence. There is no reason for this Court to grant certiorari on his complaints.

Bigford does, however, indicate his agreement with the facts outlined in the Petition for Writ of Certiorari filed by Kenneth Spoor in this Court's docketed Cause No. 87-1960, which lends support to Spoor's contention that he is entitled to qualified immunity.

Respectfully submitted,

GALVESTON COUNTY LEGAL DEPT.

BY: SCOTT LYFORD
4127 Shearn Moody Plaza
123 25th Street
Galveston, Texas 77550
(409) 766-2348

Attorney for Respondents

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NO. 88-103

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OCTOBER TERM, 1987

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PETITIONER

V.

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RESPONDENTS

SUPPLEMENTARY BRIEF FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEATRICE MLADENKA-FOWLER
NELSON, LOCKE & FOWLER
3303 Main St., Ste. 300
Houston, TX 77002-9392
(713) 526-1998

J. PATRICK WISEMAN
RICHARDS, WISEMAN & DURST
600 W. 7th Street
Austin, Texas 78701
(512) 479-5017

Attorneys for
Willie Bigford, Jr.

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Houston, TX 77002-9392
(713) 526-1998

J. PATRICK WISEMAN
RICHARDS, WISEMAN & DURST
600 W. 7th Street
Austin, Texas 78701
(512) 479-5017

Attorneys for
Willie Bigford, Jr.

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TO THE HONORABLE SUPREME COURT:

The Appellant, Willie Bigford, Jr., respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 5, 1988, with Petitioner's timely Motion for Rehearing denied on March 10, 1988.

STATUTORY PROVISIONS INVOLVED

28 U.S.C § 2403(b) states in pertinent part:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence...and for argument on the question of constitutionality.

SUPPLEMENTARY ARGUMENT FOR WRIT OF CERTIORARI

In *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988), the panel,[1] J. Rubin writing for the Court, refused to reach the merits of Bigford's due process claim, stating that "none of those who are made defendants to this claim may be

1. The Bigford panel was comprised of J. Clark, J. Gee, and J. Rubin.

held liable." *Id.* at 1221. Relying upon its earlier decision in *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) the court found that Galveston County could not be held liable for effectuation of a state policy. *Bigford, supra*, at 1223, *citing* to *Familias Unidas, supra*, at 619 F.2d 404.

The court refused to rule on the facial constitutionality of the statute challenged by Appellant because the State of Texas was not a party to the action. Nevertheless, just six months later, another panel of the Fifth Circuit,[2] J. Brown writing for the court, established in *Nash v. Chandler*, Slip Op. Nos. 86-2327 and 87-2485 (5th Cir. June 30, 1988) that the state is

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2. J. Rubin was also on the *Nash* panel with J. Brown and J. Higginbotham.

not a necessary party for a ruling on the constitutionality of a statute.

Prior to the *Nash* ruling, the status of the law was unclear as to whether the State was a necessary party for purposes of ruling on the constitutionality of a state statute. In *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985), *cert denied* 106 S.Ct. 3337 (1986), the district attorney of Potter County was granted standing to prosecute an appeal of a declaratory judgment holding Tex. Pen. Code Ann. § 21.06 (Vernon's 1974) unconstitutional. In that case, the Court en banc held that District Attorney Hill "was a member of the class, was enjoined by that judgment, and as district attorney was a proper official under Texas law to represent the state." *Id.* at p. 291.[3]

3. Similarly, in this case the district court ordered that the

Thus, it remained unclear as to whether the state was a necessary party to the litigation, given Hill's status as a member of the injured class.

In *Nash, supra*, however, there were no state officials involved in the merits of the case. The State of Texas was present in the litigation only as mandated by 28 U.S.C. 2403(b) (*Id.* at p. 4132-33). Because the plaintiffs in *Nash* had prevailed on the merits, and the district court had awarded attorneys fees against the defendants, including the State of Texas, jointly and severally, this court remanded for a determination of the State's liability

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Sheriff of Galveston County was a proper state official to represent the State of Texas in response to Bigford's challenge to the constitutionality of the statute offered by the County and his motion for intervention by the State. This issue has been previously raised in this Petition.

for attorneys' fees "...in accordance with the amount of time which was expended by the plaintiffs as a result of the State's intervention." *Id.*

As in *Bigford*, the litigation in *Nash* involved an attack on the facial constitutionality of a statute. Even though no state officials were involved in the constitutional tort alleged by the plaintiffs in *Nash*, the court nevertheless ruled on the constitutionality of the challenged statute, in conflict with its position in *Bigford* just six months earlier.

SUGGESTION FOR DISPOSITION

Appellant respectfully requests the Court to grant petition for certiorari in this case.

In the alternative, Appellant respectfully suggests that an appropriate disposition of this matter

may be to remand to the Fifth Circuit for rehearing *en banc* for resolution of the conflict existing within the Circuit.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit. In the alternative, Appellant respectfully suggests remand to the Fifth Circuit for rehearing en banc to resolve the conflict within the Circuit.

Respectfully submitted,

BEATRICE MLADENKA-FOWLER
NELSON, LOCKE & FOWLER
3303 Main St., Ste. 300
Houston, TX 77002-9392
(713) 526-1998

J. PATRICK WISEMAN
RICHARDS, WISEMAN & DURST
600 W. 7th Street
Austin, Texas 78701
(512) 479-5017

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Beatrice Mladenka-Fowler, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Respondents by depositing same in the United States Mail, certified, return receipt requested, to the following attorney of record for Respondents: Mr. Scott Lyford, Galveston County Legal Dept., 4127 Shearn Moody Plaza, 25th & Strand St., Galveston, Texas 77550, on this the _____ day of _____, 1988.

BEATRICE MLADENKA-FOWLER